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Nos. 72, 87, 290, 291.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

J. D. SHELLEY, *et al.*, *Petitioners*,

v.

LOUIS KRAEMER, *et al.*

ORSEL McGHEE, *et al.*, *Petitioners*,

v.

BENJAMIN J. SIPES, *et al.*

JAMES M. HURD, *et al.*, *Petitioners*,

v.

FREDERIC E. HODGE, *et al.*

RAPHAEL G. URCIOLO, *et al.*, *Petitioners*,

v.

FREDERIC E. HODGE, *et al.*

NOV 24 1947
CHARLES ELMORE CROPLEY
CLERK

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS AND BRIEF AMICUS CURIAE ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS.

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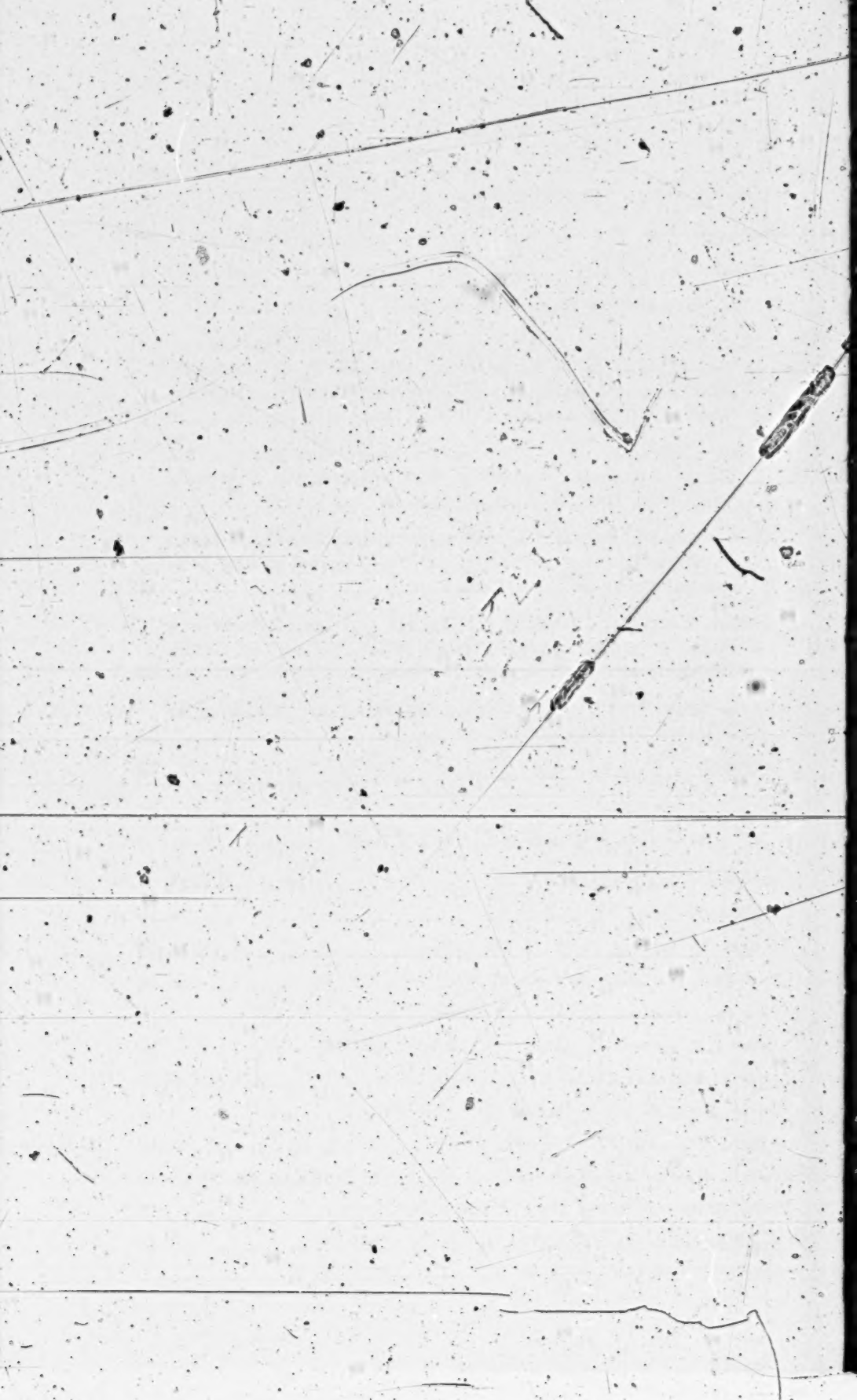

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J. D. SHELLEY, *et al.*, *Petitioners*,

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LOUIS KRAEMER, *et al.*

On Writ of Certiorari to the Supreme Court of Missouri

No. 87

ORSEL McGHEE, *et al.*, *Petitioners*,

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BENJAMIN J. SIPES, *et al.*

On Writ of Certiorari to the Supreme Court of Michigan

No. 290

JAMES M. HURD, *et al.*, *Petitioners*,

v.

FREDERIC E. HODGE, *et al.*

No. 291

RAPHAEL G. URCIOLO, *et al.*, *Petitioners*,

v.

FREDERIC E. HODGE, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS AND BRIEF AMICUS CURIAE ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Pursuant to the provisions of Rule 27 (9) of this Court, the Congress of Industrial Organizations and certain of its affiliated organizations made application to all of the parties to the instant cases for written consent to the filing of a brief *amicus curiae*.

The applicants have filed with the Clerk the written consent of counsel for Petitioners in Cases Nos. 72, 87, 290 and 291, and of counsel for Respondents in Cases Nos. 290 and 291. Applicants have received no response from counsel for Respondents in Cases Nos. 72 and 87. Special reasons for the granting of this application are contained in the accompanying brief.

INTEREST OF PARTIES FILING THIS BRIEF

The issues raised by the instant cases are of the most profound significance to applicants herein and their members. Article II of the Constitution of applicant Congress of Industrial Organizations states that the objects of the applicant organization are:

> "First. To bring about the effective organization of the working men and women of America *regardless of race, creed, color, or nationality*, and to unite them for common action into labor unions for their mutual aid and protection."

The Constitutions of its various constituent labor organizations, many of whom are applicants herein, likewise contain statements of fundamental policy against race discrimination and dedicate those organizations to the elimination of racial discrimination.

Since its formation in 1935, the Congress of Industrial Organizations has condemned the evil of racial discrimination and has actively instituted educational and legislative programs to end the evil of racial discrimination. In 1942, by action of the Executive Board of the Congress of Industrial Organizations, a Committee on Racial Discrimination was established charged with the responsibility of preparing programs for the elimination of racial discrimination.

Subsequent to the formation of the CIO Committee on Racial Discrimination, the Congress of Industrial Organizations adopted a resolution in convention restating its opposition to all forms of racial discrimination.

> "WHEREAS, Discrimination against workers because of race, religion or country of origin is an evil characteristic of our fascist enemies, we of the democracies are fighting fascism at home and abroad by welding all races, all religions and all peoples into a united body of warriors for democracy. Any discriminatory practices within our own ranks, against Negroes or other groups, directly aids the enemy by creating division, dissension and confusion. Such discrimination practices in employment policies hampers production by depriving the nation of the use of available skills and manpower; therefore be it
>
> "RESOLVED, That the CIO reiterates its firm opposition to any form of racial or religious discrimination and

renews its pledge to carry on the fight for protection in law and in fact of the rights of every racial and religious group to participate fully in our social, political and industrial life."

The applicants herein have a direct interest in the problem presented by these cases. Many thousands of members of applicant labor organizations are Negroes. Restrictive covenants have imposed upon these Negro workers unbelievable hardships in obtaining adequate housing. Restrictive covenants have also imposed upon our Negro members enforced physical isolation from decent jobs and forced them to take undesirable employment.

The effect of these covenants upon our own members has not been confined to depriving them of adequate shelter at reasonable prices and endangering their livelihood. These covenants have forced our members into slum areas which breed vice, disease and delinquency.

Finally, the enforceability of such covenants presents questions of constitutional law respecting the extent to which the judiciary is limited by the Fifth and Fourteenth Amendments. The applicants have a deep concern in assuring that civil liberties are not invaded by any branch of the government.

ISSUE PRESENTED

The issue presented is whether, where owners of real property have entered into an agreement to exclude Negroes from occupancy of property in a community, the issuance by a court of an injunction prohibiting a Negro, under pain of contempt, from occupying real property purchased and owned by him, because a former owner of such property was party to such an agreement, is in contravention of the Constitution in that—

(1) It is state action which deprives the Negro purchaser of property without due process of law within the meaning of the Fifth and Fourteenth Amendments and denies to him the equal protection of the laws guaranteed by the Fourteenth Amendment, and

(2) It fails to enforce, as the supreme law of the land, in accordance with Article VI of the Constitution,

(a) the federal statute, R. S. §1978 (8 U.S.C. §42) declaring

that every citizen shall have the same right to purchase real property as white citizens, and

(b) the Charter of the United Nations (Articles 55c and 56) requiring the United States to promote observance of fundamental freedoms without distinction as to race.

ARGUMENT

The briefs by the Petitioners and by other *amici curiae* in these cases fully develop the legal issue involved. We concur in the analyses and legal conclusions presented therein and advert here only to those arguments and considerations which may not have already been urged upon the Court.

I.

THE NATURE OF THE RIGHT HERE INVOLVED

As part of the constitutional settlement of the Civil War, constitutional protection against state interference was extended to the right to purchase, use and dispose of property without discrimination on the basis of race. It must be emphasized that the right involved herein is a civil right. See *Buchanan* v. *Warley*, 245 U. S. 60. It is "one of those fundamental rights which are the essence of civil freedom." *Civil Rights Cases*, 109 U. S. 3, 22.

The evils which have flowed from the systematic suppression of this right through the judicial enforcement of restrictive covenants dramatically illustrates the basic character of this right. Where Negroes are denied the opportunity to purchase or occupy homes through legally enforced restrictive covenants a basic foundation is laid for the imposition of other forms of discrimination. Because restrictive covenants force Negroes to live in ghettos, Negro communities rapidly become prey to the whole invidious gamut of segregation and Jim Crow. Negroes who suffer enforced concentration in areas bounded by restrictive covenants inevitably find themselves trapped in a system of Jim Crow which pervades every aspect of their existence. The initial denial of the right freely to purchase a home upon the same basis as a white man ultimately produced far-reaching diminution and loss of political rights as the economic material supplied in Petitioners' briefs demonstrates.

The right to acquire and hold property as a home without discrimination because of race enjoys at least the same protection as freedom of speech, religion and the press. Other basic rights of the Negro cannot be protected if the right to acquire living space can be denied. Invasion of the right herein involved can only be sanctioned by the existence of a clear and present danger to a vital public interest. But our Nation was the theater of a bloody civil war in which thousands of lives were lost and countless treasure spent because of the conviction that the state itself could not survive consistently with the suppression of that right and the rights cognate to it.

II.

THE ACTION OF A STATE IN ENFORCING A RESTRICTIVE COVENANT OR PERMITTING IT TO BE ENFORCED IS PROHIBITED STATE ACTION REGARDLESS OF THE FACT THAT THE COVENANT DOES NOT ORIGINATE THROUGH OFFICIAL ACTION.

Respondents urge that the enforcement of the covenants decreed below is distinguishable from what was condemned in *Buchanan* v. *Warley, supra*, because the restriction there was promulgated by public authority while in these cases it is the work of individuals. A short answer is that in both cases, it is the machinery of government, and only the machinery of government which makes the restriction effective. But in any event it is without legal consequence, in the determination of the constitutional issue, whether the discrimination is essentially that of private persons which the courts simply enforce or whether the state, by attaching the sanctions of its courts and officers to the covenants, is itself guilty of direct discrimination. The more recent decisions of this Court reveal an approach to the question of state action far too realistic to permit the Court to be misled by the appearance of private action under such circumstances as are here involved.

March v. *Alabama*, 326 U. S. 501 (1946), is only the latest in a series of cases developing this approach. Such decisions have settled that the discriminatory use of public or quasi-public powers by persons in whom such powers are vested either explicitly or implicitly is no less unconstitutional than

direct legislation or other more obviously governmental action such as that under consideration in *Buchanan* v. *Warley*. See Tefft, *Marsh* v. *Alabama*—A Suggestion Concerning Racial Restrictive Covenants, Vol. VI National Bar J., No. 2 (June, 1946, p. 133).

These respective covenant cases fall squarely within the doctrine enunciated by this Court in *Marsh* v. *Alabama*. There, the proprietors of a company-owned town, who owned in fee all of the land in the town, including the streets, denied Marsh access to such streets when she sought to go upon them for the purpose of distributing religious literature. It had previously been held that the right to distribute such literature in the public streets was guaranteed by the First and Fourteenth Amendments. The proprietors, however, relied on the fact that their private property was involved and their contention that the streets were private property was upheld by the Supreme Court of Alabama.

Marsh having refused to leave these "private" premises, criminal proceedings were taken against her under the local statute which made trespass after warning a crime and she was convicted. This Court held, in reviewing the conviction, that it was state action in violation of the guarantees of the Fourteenth Amendment. In the light of the nature of the property in question and the purpose sought to be achieved through the exercise of the property rights, this Court held that Alabama was compelled by the Constitution to prefer rights guaranteed by the Constitution to members of a community over rights flowing from ownership of property. In upholding Marsh's exercise of her constitutional rights on the "private" streets in question, this Court took the view that the property rights of the owners of a town, like the property rights of the owners of a highway dedicated to public use, are circumscribed by the constitutional rights of members of the public:

> "We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on

that business block. Cf. *Barney* v. *Keokuk*, 94 U. S. 324, 340, 24 L. ed. 224, 228. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments of the Constitution." (326 U.S. 507–8)

The same principles are applicable here. That the state has empowered members of the community to restrict the purpose to which their respective properties may be put and has afforded to the members of the community the powers of the state in the enforcement of such restrictions does not justify the members of the community in adopting for the entire community restrictions the effect of which is to deny constitutional right, and state law, declared by the courts, which enforces such action by punishing with substantially criminal sanctions those who refuse to acquiesce in such a deprivation of constitutional right similarly violates the Fourteenth Amendment.

As in this case, so in *Marsh* v. *Alabama* it was strenuously urged, and the view was accepted by the state courts, that the state action prohibiting and punishing the exercise of constitutional rights was justified because the prohibition had reference only to private property. But this Court said:

> "We do not agree that the corporation's property interests settle the question. [Footnote omitted.] The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion." (326 U.S. 505–6)

It is noteworthy that although the private corporation had

unquestioned and complete ownership in the sense of a fee simple title to the property in question, the Court nonetheless emphasized that "Ownership does not always mean absolute dominion." *A fortiori*, it would seem is the case where the property interest asserted does not attain even the dignity of an interest in land but is a mere covenant. The nature of the private interest in vindication of which state action is sought in these restrictive covenant cases is such that it can be of but little weight as against the constitutional guarantee which is sought to be avoided.

In the *Marsh* case, the Court took pains to indicate that an important factor in its decision was that many persons live in such company-owned towns and that to uphold the view taken by the Alabama Supreme Court would tend to deprive all of such people of constitutional guarantees. (326 U. S. 508. Precisely such considerations are involved here. Indeed, there is every reason to suppose that the number of persons affected by racial restrictive covenants far exceeds the number of the inhabitants of company-owned towns. To uphold the covenants in issue is, as has been pointed out, not simply to deny the right to retain their property to the defendants in these particular suits. It is to permit in substance the promulgation of private laws, endowed with the most potent of governmental enforcing powers, and requiring the exclusion of an entire race and perhaps other races from housing facilities. And all this on the basis of the prejudices of individuals who have no property interest in the facilities so denied.

In summing up in *Marsh* v. *Alabama*, the opinion states:

> "In our view the circumstances that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." (326 U.S. 509)

It is to be noted that in *Marsh*, as in these cases, the denial

of constitutional right was effectuated only through the holding of a state court that a breach of requirements privately imposed constituted a violation of state law. It was only through the use of the state law and state law enforcement procedure that the unconstitutional purpose was achieved, and it was the action of the state in enforcing the private discrimination which was the subject of constitutional condemnation. So here it is the action of the states through their courts, in adding the sanction of fine and imprisonment to an agreement, the purpose of which is to achieve an unconstitutional discrimination, that must be struck down.

Also relevant to decision in these restrictive covenant cases in the view taken in regard to state action in *Smith* v. *Allwright*, 321 U. S. 649 (1944). There it was also urged that action by "private" agencies, permitted by a state, in a field in which the Constitution prohibits racial discrimination, was private action to which the guarantees of the Fourteenth Amendment had no relevance. There the case was that the Democratic Party of Texas had by resolution of its state convention excluded Negroes from membership and hence from participation in the Democratic primary. The Negro plaintiff was refused a Democratic ballot by the defendant election judges and alleged that he had thereby been deprived of constitutional rights. The real question was whether it was state or private action that excluded Negroes from voting in the Democratic primary. Beginning with the proposition that the right to vote in primaries, as well as in general elections, is secured by the Constitution against denial on a racial basis through state action, this Court came to the conclusion that, where the state permitted the party to discriminate in the primary and then restricted the choice of the voters in the general election to the candidates so selected, the state by so adopting and enforcing the discrimination of the party made it state action. The following language was used in the opinion:

> "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States* v. *Classic*, 313 U. S. at 314, 85 L. ed. 1376, 61 S. Ct. 1031; *Myers* v. *Anderson*, 238 U. S. 368,

59 L. ed. 1349, 35 S. Ct. 932; Ex parte Yarbrough, 110 U. S. 651, 663 et seq., 28 L. ed. 274, 278 4 S. Ct. 152. By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color. . . ." (321 U. S. 661–2)

The opinion further states:

"The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson*, 307 U. S. 268, 275, 83 L. ed. 1281, 1287, 59 S. Ct. 872.

"The privilege of membership in a party may be, as this Court said in *Grovey* v. *Townsend*, 295 U. S. 45, 55, 79 L. ed. 1292, 1297, 97 ALR 680, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state." (321 U. S. 664–5)

These restrictive covenant cases present a situation closely analogous to that before the Court in *Smith* v. *Allwright*. Here, too, it is clear under the long-established and unquestioned rule of *Buchanan* v. *Warley*, 245 U. S. 60 (1917), that the right to purchase and occupy property is protected by the Fourteenth Amendment from racial discrimination through state authority. And here, too, it is urged that the action of the state in implementing and enforcing the concerted acts of individuals, purposed to deny on racial grounds the right of ownership and occupancy of property, is private action with which the state has no concern. Yet here the state has not only, as in *Smith* v. *Allwright*, endorsed, adopted and enforced the discrimination practiced by individuals; it has effectuated the discrimination by the addition of sanctions of its own which it superimposes on the discriminatory agreements created by the parties. Moreover, as a practical matter,

it is only because these state sanctions have been imposed that these discriminatory arrangements are made effective. The power of the state imparts strength and vitality to discriminatory practices which might otherwise remain without force. That which the Constitution prevents the state from doing directly is accomplished by indirection, if the state is permitted to seize upon the agreement of the parties as an excuse for the imposition of legal restraints, which the parties without affirmative state intervention would be powerless to maintain.[1]

This Court has recognized the existence of discriminatory governmental action in situations where the incidence of such action was far less direct than in these restrictive covenant cases. *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944) was a suit brought by a Negro railroad employee to enjoin the enforcement of an agreement between a union and his employer pursuant to which agreement discrimination against colored employees was required. The Railway Labor Act made the union the exclusive bargaining representative for the craft of which the plaintiff was a member. The Supreme Court of Alabama affirmed a judgment dismissing the suit. This Court characterized that decision as follows:

> "It [the Alabama court] construed the statute, not as creating the relationship of principal and agent between

[1] True enough, in these cases, the state has not by legislative action prohibited Negro use and occupancy of specific areas. It has not enacted an ordinance prohibiting such occupancy except with the consent of a specified number of persons of another race, as in *Harmon* v. *Tyler*, 273 U. S. 668 (1927). It has, however, vested the power to prohibit such occupancy in property owners for the time being and this not simply as an ordinary incident of ownership of property, but regardless of such ownership and even in derogation of the ordinary property rights of other owners. It has permitted private persons to make an essentially legislative determination effective for all time in the future, regardless of the wishes of subsequent owners of the land. Moreover, the state has by the action of its courts provided that, where members of the White race have agreed the Negroes should henceforth be excluded from a particular area, such an agreement once made shall have the force of a criminal sanction attached to a zoning law of similar purport. The power of the legislature to vest zoning functions in private groups or individuals has been closely limited. *Eubank* v. *Richmond*, 226 U. S. 137 (1912); *State of Washington* v. *Roberge*, 278 U. S. 116 (1928). That it may be vested in private individuals to be used for purposes of implementing racial discrimination is, it is submitted, completely inconceivable.

the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them." (323 U. S. 198)

This Court, however, recognized that such a holding presented a constitutional question:

> "If, as the State court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading." (323 U. S. 198–9)

It must be noted that the discrimination in the *Steele* case was far less clearly state action than that which is involved in state court injunctions enforcing restrictive covenants. For in the restrictive covenane cases the discrimination cannot be effective, except through the intervention of the machinery of government. Yet there was no showing in the *Steele* case that the union there concerned could not have achieved its purpose of racial discrimination through collective bargaining, even without the status especially conferred upon it by statute. Nonetheless, that the statute gave the union such powers, regardless of whether they were necessary to achieve the discrimination, was conceived to be a sufficient basis for a constitutional question. Far more obvious is the case where

the discrimination is directly imposed by a state agency, without the aid of which private efforts to discriminate would be unavailing. If the Constitution prevents a labor union from imposing racial discrimination, where the union is capable of enforcing its policy without the aid of state action, it is difficult to understand how the Constitution can permit a court, itself the instrumentality of a state, to impose racial discrimination, where the persons at whose behest the court acts are incapable of enforcing such a policy, except with the aid of the court and the machinery of government which it sets in motion.

Of course, the Court in the *Steele* case, applying familiar principles of constitutional law, endeavored to avoid the constitutional question posed by Mr. Chief Justice Stone at the beginning of the opinion by construing the statute to require the union to use its bargaining powers in non-discriminatory fashion. But this result had to be reached through interpretation and despite the absence of specific language so that Mr. Justice Murphy, concurring, suggested that such a construction could be justified only on the ground of necessity because "otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment . . ." (323 U. S. 208).

III.

THIS COURT HAS NEVER DECIDED THE QUESTION WHETHER STATE COURT INJUNCTIONS ENFORCING RACIAL RESTRICTIVE COVENANTS CONTRAVENE CONSTITUTIONAL GUARANTEES.

Corrigan v. *Buckley*, 271 U. S. 323 (1926), which is pressed upon this Court as authority that the covenants in these cases can be enforced by injunction without transgressing constitutional guarantees, did not reach this question. It is submitted that the courts which have cited that case as such authority have misunderstood that decision and have accepted it as establishing a proposition of law which was not involved.

The only argument which the Court in the *Corrigan* case passed upon was that the covenant itself, as distinguished from the state action through which it was enforced, was

unconstitutional under the Fifth, Thirteenth and Fourteenth Amendments. This the Court specifically stated:

> "Under the pleadings in the present case the only constitutional question was that arising under the assertions in the motion to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments." (329–30)

The opinion of the Court further states clearly that the issue of state action was raised for the first time in the Supreme Court and was therefore not to be considered:

> "And while it was further urged in this court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the court of appeals or in this court; and it likewise is lacking in substance." (331)

In such circumstances the statement that the contention "likewise is lacking in substance" is the clearest dictum and should certainly not be binding upon this Court when the issue is properly presented. *Corrigan* v. *Buckley* was, of course, dismissed for want of jurisdiction, no constitutional question having been considered on the merits. Even for the narrow point decided, the case has been cited only once by this Court in the twenty years which have elapsed since its decision. *United States* v. *Johnson*, 327 U. S. 106, 113 (1946).

Moreover, the constitutional problem presented by restrictive covenants in the light of the fact that they are substantially zoning ordinances was not even mentioned, possibly because the fact situations which give rise to the constitutional question did not then exist and more probably because no substantial data had yet been collected on the subject. Twenty years ago restrictive covenants were not only far less prevalent than they are today but the urbanization of the Negro

was still a new social phenomenon and the problem was by no means so acute. See the dissenting opinion of Edgerton, J. in *Mays* v. *Burgess*, 147 F. 2d 869, 876 et seq (C.A.D.C., 1945), tracing the development of the problem in the District of Columbia alone since *Corrigan* v. *Buckley*.

The case was also decided before the importance of racial restrictive covenants was realized and before the implications of a decision upholding such covenants could be fully understood. As late as 1922, the Report of the Chicago Commission on Race Relations, *The Negro in Chicago*, a study of the race riots in Chicago in 1919, which devoted some 125 pages (106–230) to the distribution of the Negro population and to its housing problem, and discussed in some detail the methods used by property owners to exclude Negroes from White areas, did not seem to mention restrictive covenants as a factor in segregation. Evidently covenants were then not yet considered important.

Furthermore, not only were the facts, as they were known at the time of *Corrigan* v. *Buckley*, too hazy to focus the constitutional problem as it is now presented, but the law with respect to state action constituting a violation of the Fourteenth Amendment was also far too little developed to present the question which is now before this Court. As *United States* v. *Classic*, 313 U. S. 299 (1941) made necessary the reconsideration of *Grovey* v. *Townsend*, 295 U. S. 45 (1935) in the light of the cases which had previously upheld the rights of Negroes to vote, so *Marsh* v. *Alabama* requires a reconsideration of *Corrigan* v. *Buckley* in the light of *Buchanan* v. *Warley*.

It is noteworthy that the earliest reported case in an American jurisdiction in which the validity of a racial restrictive covenant was considered, *Gandolfo* v. *Hartman*, 49 Fed. 181 (Cir. Ct., Calif., 1892), held that its enforcement by injunction would be in violation of the Fourteenth Amendment. That case appears to be the only federal case prior to *Corrigan* v. *Buckley* in which such a question was raised. There the restriction was directed against Chinese rather than Negroes but the principles involved and the arguments presented were the same as those in the anti-Negro cases. The usual "private

action" argument to the effect that there was no legislation involved and hence that the Fourteenth Amendment did not apply was apparently pressed on the court. In answer the opinion stated:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other." (182)

This case was, of course, decided almost a decade after the *Civil Rights Cases*, 109 U. S. 3 (1883), had established that the Fourteenth Amendment was protection only against governmental action and not against the activities of individuals in a private capacity. This makes even more clear, what would have not been particularly doubtful from the language of the opinion alone, that the court did not rely on any mistaken interpretation of the Fourteenth Amendment, by reason of which the restrictive agreement would itself be void, but based the holding on a conclusion that judicial enforcement of the restriction would be prohibited governmental action. It is unnecesary to speculate on the question whether the court considered itself bound, in what may have been a diversity case, by whatever restrictions would have been applicable to the action of state courts in the premises for no different result could have been reached on the basis of the Fifth Amendment.

Gandolfo v. *Hartman* appears to have been overlooked in the decision of *Corrigan* v. *Buckley*, both in the Court of Appeals and in this Court. The persuasiveness of the views there stated plus the fact that they seem to have been subsequently overlooked is another reason for the reconsideration of the *Corrigan* v. *Buckley* dictum at this time.

IV.

CONSTITUTIONAL SANCTION FOR THE INJUNCTIONS IN ISSUE MAY RESULT IN DEPRIVING NEGROES THROUGHOUT THE COUNTRY OF ANY SUBSTANTIAL CHOICE OF HOME SITES.

In determining the questions presented in this case the Court cannot be blind to the effect of its decision on the availability of housing facilities to entire races of Americans as well as its effect on land usage generally. To uphold these covenants is to admit that the agreements of private individuals regarding the use of land by particular races may be given the force of zoning ordinances. It will thus become possible for private persons of one generation to bind future generations in the use of land and by so doing perpetually to exclude one or more races of citizens from the opportunity to acquire and utilize it.

This Court has already denied that such powers may be vested even in legislatures. Yet those who seek enforcement of the covenants in this case are in the position of demanding that such powers be vested in irresponsible private groups whose judgments are not even amenable to the political pressures which operate on legislators in a democracy. A zoning ordinance restricting the use and occupancy of land on a racial basis and enacted by a town counsel or state legislature is subject to repeal and reconsideration by the enacting authority as more mature consideration or later experience shows that the ordinance is unwise either on economic or on humanitarian grounds. Such a restriction is also subject to direct or indirect review at the polls. There is no such *locus penitentiae* in respect of these private zoning ordinances. Once adopted, and subject only to diverse mitigating rules differing in the various states and sometimes haphazardly applied (see note to *Kathan* v. *Stevenson*, 307 Mich. 485, 12 N.W. (2d) 332 (1943) in 42 Mich. L. Rev. 923 (1944) and 3 Tiffany, *Real Property* §§871-5 (3d ed. 1939)) they stand forever as statutes enforceable irrespective of changes of circumstances, development of public morals and movements of population if only a single individual remains in the community who desires enforcement.

The practice of including restrictions in the subdivision of new plots for residential uses appears to be spreading. A decision by this Court that state courts may add substantially criminal penalties to these private statutes will give impetus to this tendency. Moreover, as the proportion of restricted residential land increases, the probability that unrestricted land will be occupied predominantly by Negroes is also enhanced. Thus competition tends to force the adoption of discriminatory policies by subdividers and communities who might be loath to discriminate were they not faced with the apparent dilemma of either excluding Negroes completely or turning over the area to Negroes only. It may be forecast, if the judgments under review are upheld, that a large proportion of desirable residential land may thus be closed for various periods of time or perhaps in perpetuity to Negro occupancy.

On the other hand, if it were once and for all declared that the Constitution prohibits racial zoning, whether initiated by public officials or by individuals in the community, the penetration of Negroes into urban communities would tend to relate itself to the same economic and social factors as control the movements of other groups in cities. It is foreseeable that over a period of years the resultant diffusion and dispersion of the Negro population would eliminate any factual basis for the arguments of even those who justify restrictive covenants on policy grounds.

It should not be overlooked that the problem is not limited to Negroes alone. Restrictive covenants aimed at other races are common, especially in the West. And, if this type of covenant is to be given constitutional sanction, no reason is apparent why other bases of discrimination should not be selected. Bigotry may well feed on the opportunity for its exercise.

These are not idle speculations. The magnitude of the problem is by no means reflected by the data presented in the briefs and materials before the Court in respect of the prevalence of restrictive covenants. These petitioners have not the resources to underwrite the systematic study of re-

strictive covenants in urban communities which would be necessary for a definitive analysis. But enough data have been collected to show that even today the effect of covenants is to deny living space to Negroes in white communities.

Although it may present no constitutional law aspects, the problem of economic land usage which will be created if injunctions enforcing racial restrictive covenants are upheld should likewise not be overlooked. The natural expansion of cities tends to convert their central and older areas to business and industrial uses. Older residential areas become less desirable and therefore available to groups financially less able than the original occupants. Artificial restraints on such a transition, through the use of racial restrictive covenants, tends to make economic use of the land impossible and to work hardship on its owners. By the same tokens artificial limitations of areas of Negro occupancy tend to inflate rental income in such areas and prevents the removal of obsolete and undesirable structures and their replacement by buildings which would utilize the land to the best economic advantage.

Questions of economic land usage aside, the pattern of urban development is such that business and industrial uses tend also to encroach upon areas now available for Negro habitation. If a doctrine of constitutional law is promulgated permitting injunctive enforcement of racial restrictions, newer residential areas will in all likelihood be closed to Negroes. Ultimately, the result of the two tendencies would be the complete exclusion of the Negro from the community. It seems unthinkable that such a result can be accomplished under our Constitution, whatever the means invoked.

V.

RACE IS A VAGUE AND ABSTRACT CONCEPT AND CANNOT SERVE AS A BASIS FOR A RESTRICTIVE COVENANT WHICH A COURT OF EQUITY WILL ENFORCE.

It is commonplace that before a Court of Equity will enforce a restrictive covenant the conditions upon which the covenant is based must be clearly defined and objectively identifiable.

But the concept of race is a vague and fluid concept which cannot serve as an adequate basis for the establishment of rights or disabilities.

The range of physical variability in mankind has given rise to repeated attempts to classify peoples into groups with similar inherited characteristics. Yet these characteristics are not fundamentally distinct and are overshadowed by the essential uniformities of man morphologically. An individual's "race" cannot be determined with absolute certainty by his appearance. The variations in the physical appearance among "races" are not sharp and distinct but are a series of gradations.

Where people have in common several such physical variations, they are said to form a "race." (Other terms such as stock, breed, type, are sometimes used in making larger or smaller distinctions, but "race" is the most commonly understood word.) No one single trait is the basis of classification, nor the presence in any one individual of a certain number of traits; "race" is determined by the preponderance in the group of several such traits. Consequently "race" is really a biological abstraction, and cannot in practice be precisely defined. "Races" "are loose aggregates which precipitate out en masse."[1]

This difficulty in definition is evident in the different racial classifications that have been made. Classifications have varied in accordance with the series of traits selected as race criteria, with the significance assigned to small differences by the observer, and with other fluctuations in observation. One anthropologist has pointed out that races are "creations of the investigator, and creations with regard to which all the creators are by no means in agreement."[2]

There is much difference among anthropologists about the details of race and race classification. There is unanimity, however, on the point that "Anthropology provides no scientific basis for discrimination against any people on the ground

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[1] Krogman, W. M., "The Concept of Race," in the Science of Man and the World Crisis (Ed. Linton) Col. Univ. Press (1945, p. 53).

[2] Linton, Ralph, *The Study of Man*, Appleton-Century (1936, p. 39).

of racial inferiority, religious affiliation or linguistic heritage."[1]

The meager scientific facts with respect to the basic groupings of the peoples of mankind have been converted through ignorance and prejudice into rigid structures based upon "believed in" differences. These "believed-in" differences are a form of modern ethnocentricism, and assume the greatest importance in periods and places of conflict and competition. The pattern of belief about "races" is stirred into action when there is competition for housing, or for jobs, for example. Competition builds fears, and these fears seek expression in action against a scapegoat or a competitor who can be identified in some way—very often color—as belonging to another group.

Social concepts of race differ greatly, but are alike in being inconsistent and plastic. They do not classify in any ordered or systematic way, but assign to heterogeneous physical or homogenous cultural groups a fictitious common ancestry and fictitious mental or temperamental differences. Nationality groups, such as Italians, religious groups, such as Jews, and linguistic groups, such as Aryans, are often considered to be "racial" groups. And the definition of actual biological groups becomes socially arbitrary as different decisions are made about progeny of mixed ancestry. Thus, in the United States persons are considered to be Negro if they are known to have any Negro ancestry at all, even if they be straight haired, blue eyed and white skinned—biologically Caucasian. Not so far away, in the Caribbean, the reverse is true; any person with noticeable "white blood" is called white. In the case of these mixed persons, then, their "race" depends on their geographical location alone, and not on a set of scientific criteria.

Social concepts with respect to "race" are therefore even more capricious and treacherous than biological concepts. The latter vary with the scientist's system, methodology and observations. The former vary in accordance with local traditions or historic prejudice. Unless we are prepared to substitute for objectivity and scientific truth the trumpery of the Nurenberg laws and the Nazi "science" of *"blut und boden,"*

[1] Resolution of the American Anthropological Association of Dec., 1938, quoted in "Science," vol. 89, no. 2298, Jan. 19, 1939.

we must recognize that a court cannot permit itself to determine the rights and disabilities of individuals upon the basis of "race".

VI.

THE CONTENTION THAT RESTRICTIVE COVENANTS ARE NECESSARY TO PRESERVE PROPERTY VALUES*

Respondents in these cases will undoubtedly repeat the charge that Negroes are inferior tenants, neighbors and landlords and that it is therefore necessary to exclude them from certain properties in order to preserve the values of these and surrounding properties in the neighborhood. A short answer to this contention, of course, is that the suppression of the civil rights of minority groups is not justified because it is profitable.

As a matter of fact, the available experience refutes this attempted justification of the restrictive covenant. For example, surveys made in the public housing field demonstrate that Negro tenants when compared to other tenants in similar income groups are responsible rent payers to the same degree as are other tenants. Similarly, with respect to the property maintenance, the experience with public housing projects indicates that the projects occupied by Negroes are maintained fully as well as those occupied by Whites. Studies made by the Federal Housing Agency on the effect of public housing projects occupied by Negroes upon the values of rent-paying property occupied by Whites refute the contention that Negro occupancy lowers the value of property.

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*The material in this portion of the brief is based upon the following sources: Robert C. Weaver, "Race Restrictive Housing Covenants," 20 Journal of Land and Public Utility Economics 183 (Aug. 1944); National Housing Agency (Racial Relations Service), "Summary and Digest of the Orientation Conference for Racial Relations Advisers" (Oct. 28-Nov. 2, 1946, Washington, D. C.); National Association of Real Estate Boards, "News Release No. 78" (Nov. 15, 1944, Washington, D. C.); Corienne K. Robinson, "Relationship Between Condition of Dwellings and Rentals, By Race", 22 Journal of Land and Public Utility Economics 296 (Aug. 1946); Housing Management Bulletin (January 1943); James T. Daniels, "Public Housing As Seen By a Former Chamber of Commerce Manager," The American City (June, 1941); Alonzo Moron, "Where Shall They Live?", The American City (April, 1942).

Too frequently Negro residency is blamed for the deterioration of property values which have altogether different causes. Thus, in many instances it is the influence of the slum area which deteriorates the value of fringe properties not the fact that the slum areas are inhabited by Negroes.

Moreover, in a large number of cases it is a standing phenomenon in shifts in urban occupancy patterns that the change-over from white to Negro occupancy results not in the decrease of the value of the property but in an increase in its value.

It has now become a systematic practice of real estate management deliberately to bring Negro residents into an area for the purpose of reaping the higher profits resulting from exploitation of the Negro rental market. The results of this practice, reflected in increased occupancy density and higher rents per unit, with the final creation of a lucrative slum, is to be found in every urban community. Certainly in these cases, the value of property in terms of rental income is enormously enhanced by Negro residency.

The same is equally true where properties are made available to the Negro home purchasers' market.

The contentions which are raised with respect to the character of the Negro as a landlord or tenant present a familiar instance of the entire pattern which seeks to justify Negro discrimination. Negroes, through the operation of discriminatory practices, are isolated in a substandard environment and converted into second-class citizens. Those responsible for these attacks upon the rights of Negroes then not only blame the Negro for the environment into which he has been unwillingly forced and from which there is no escape but actually point to that environment to justify their own undemocratic and anti-social behavior.

CONCLUSION

Whether the Negro people in this country will have an opportunity in the future to obtain adequate housing or whether they will be forced to remain in the ghetto-slum areas which, for the most part, they now occupy depends upon

the Court's decision in these cases. We urge the Court to refute the racist principles upon which the restrictive covenants in these cases rest.

It is respectfully submitted that this Court for the reasons stated above reverse the judgments of the courts below.

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